In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 25

FREDERICK T. ZUBER, ET AL., PETITIONERS

v.

RUSSELL ALLEN, ET AL.

No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, PETITIONER

v.

RUSSELL ALLEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF AGRICULTURE

In the main, respondents' arguments raise no issues not aired in the government's opening brief, and hence require no reply. Underlying much of their argument, however, is the proposition that because the nearby differential is paid from the marketwide pool before the blended price is determined, it is in effect an unlawful "subsidy" of nearby farmers by distant ones. It is to

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this proposition—and the accompanying assertion that any payment of such a differential should be made by individual handlers—that this reply brief is addressed.

1. It is true that like many other differentials, the nearby differential is paid out of the marketwide pool and thus does have the technical effect of reducing the blend price from which each farmer's receipts are calculated. It is circular, however, to argue from this relationship that the differential is an unlawful tax on distant farmers for the benefit of the near. Under federal regulation, farmers are not entitled to absolute equality of treatment. Only if nearby and distant farmers are entitled by the Act to receive identical sums for their milk can one say that the distant farmers are being "taxed"—*i.e.*, deprived of funds to which they are entitled—for the benefit of the nearby farmers. Thus, the argument assumes what it is meant to prove. The economic reality of the situation is that nearby farmers, as a result of the nearby differential, receive somewhat more for their milk than do distant farmers; if that is a state of facts envisioned by the Act, the mechanism for bringing it about is irrelevant.

It is improper to argue, as respondents do, that the nearby differential is illegal under the Act because it results in lower prices to distant farmers than would regulation under the Act without that differential. As we have shown in our main brief, what the Act seeks to do is to approximate, but in an orderly way, the pricing structure which would exist in the market *in the absence* of regulation. The proper comparison is between the prices distant farmers now receive and the prices they would receive in an orderly market in the absence of

any regulation at all. On that comparison, the differential is valid.

2. Section 8c(5)(B)(ii) provides that Milk Marketing Orders may contain "adjustments for (a) volume, market, and production differentials customarily applied by the handlers * * *." Thus, the Act explicitly permits the Secretary to *require* the payment of "customarily applied" market differentials; he need not depend on handlers to continue their custom. If, as we have urged, the differential falls within the term "market differentials" and was customarily applied, then it is authorized.

The payment of differentials out of the pool has a long history of acceptance. The practice of the cooperatives, on which the Act drew, was to distribute payments received from handlers to their members equitably, not equally. The differentials the cooperatives used were paid out of the pool, thus "reducing" the blend price in the same manner as the nearby differential does now. See, *e.g.*, H. Doc. 501, 74th Cong., 2d Sess. (1936), pp. 37–39. The 1935 Act follows those cooperative methods. See our main brief pp. 30–38. The nearby differential sustained in *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 567, was paid partly from the pool and partly by the handlers. *Id.* at 551–552, n. 14. The farm location differential of the Boston Order upheld in *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342, 346 (C.A. 1), also was

payable from the pool. So are other differentials currently in effect.[1]

Finally, it would be inconsistent with the purposes of the Act for the Secretary to leave to individual handlers the payment of whatever premiums they deem appropriate for nearby milk, as respondents and the court of appeals in *Blair* v. *Freeman,* 370 F. 2d 229, 238–239, insisted must be done. Leaving it to individual handlers to pay such differentials as each feels is warranted, in light of the regulation imposed upon him, is an invitation to uneven treatment of farmers similarly situated—and thus to destructive competition among farmers for premiums, contrary to the Act's main purpose of stabilizing the market. The argument that the Order should not provide for a premium to nearby farmers is not so much one against this particular differential as it is one against any differential regulation. The Act does not require the Secretary to leave payment of other differentials to each handler, depending upon the value of the milk to the handler; an individual handler cannot avoid paying the butterfat differential (a "quality" differential) contained in an Order if he views milk with high butterfat content as having little value to him. No reason appears why the nearby differential, in particular, must be left to the handlers to pay.

[1] See Summary of Major Provisions in Federal Milk Marketing Orders (U.S.D.A. 1969), Table 17, pp. 59–63, col. 2. All positive differentials there listed, of which there are eleven, are paid in part by the pool, and thus reduce the blend price.

For the reasons stated above and in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969